



Office of the Attorney General

State of Texas

May 20, 1993

DAN MORALES

ATTORNEY GENERAL

Ms. Lynn Nunns
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR93-259

Dear Ms. Nunns:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 14809.

The City of Corpus Christi (the "city") has received two requests for information relating to a certain city employee's termination. Specifically, the requestor, who is the city employee at issue here, seeks his entire personnel file and "a copy of all Board Policies concerning my rights to appeal my termination", "a copy of all the policies the City of Corpus Christi has for terminating me", "copies of all statements you have from anyone about me", "copies of any anonymous, signed, oral, written, or transcribed statements about me from anyone", and "a copy of the policy which the City of Corpus Christi relies upon in firing me as referred to in the letter dated November 21, 1991."

You advise us that most of the requested information has been made available to the requestor. You have submitted to us for review six documents (Attachments A through F). Attachments A and F are handwritten notes concerning the requestor's injuries. Attachment B is a memorandum to the file drafted by Denise Villagran of the city's risk management department. Attachment C is a draft letter to Mr. Charles Henderson, the requestor, from the Director of Engineering Services. Attachment D appears to be a handwritten note from an assistant city attorney to a city employee. Attachment E appears to be a compilation of three or four handwritten notes regarding the draft letter. You claim that these documents are excepted from required public disclosure by sections 3(a)(1) and 3(a)(3) of the Open Records Act.

Section 3(a)(3) excepts

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective

attorneys of the various political subdivisions has determined should be withheld from public inspection.

V.T.C.S. art. 6252-17a, § 3(a)(3). Section 3(a)(3) applies only when litigation in a specific matter is pending or reasonably anticipated and only to information clearly relevant to that litigation. Open Records Decision No. 551 (1990). The litigation exception may be applied to records relating to a contested case before an administrative agency subject to the Administrative Procedure and Texas Register Act (APTRA), V.T.C.S. article 6252-13a. Open Records Decision Nos. 588 (1991); 368 (1983).

You contend that section 3(a)(3) is applicable here because the requested information relates to an action pending before the city's Civil Service Board. You do not explain, however, how this action constitutes litigation within the meaning of section 3(a)(3). We are not aware of any authority which supports your contention, and, despite our repeated requests, you have failed to bring any such authority to our attention. The Open Records Act places on the custodian of records the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). A claim that an exception applies with no explanation of why it applies will not suffice. *Id.* Consequently, we have no basis for concluding that the requested information may be withheld under section 3(a)(3) of the Open Records Act.

You also claim that some of the requested information, specifically Attachments B, C, D, and E, is excepted from required public disclosure by the attorney-client privilege as incorporated by section 3(a)(1) into the Open Records Act. Although this office has frequently cited section 3(a)(1) to except from required public disclosure information within the attorney-client privilege, the privilege is more specifically covered under section 3(a)(7). Open Records Decision No. 574 (1990). Section 3(a)(7) protects

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure. (Footnote omitted.)

Attorney-client communications, however, may be withheld only to the extent that such communications document confidences of governmental representatives or reveal the attorney's legal opinion and advice. Open Records Decision No. 574 at 3. Purely factual information is not protected by section 3(a)(7). *Id.*

Attachment B, a memorandum to the file drafted by Denise Villagran of the city's risk management department, memorializes the proceedings of the Disability Review Committee Meeting of August 8, 1991. You claim that it is excepted by section 3(a)(7) because an assistant city attorney attended the meeting and "discussed legal matters with her clients." The mere fact that an attorney attended a meeting is not a sufficient basis for invoking the attorney-client privilege for a document which merely memorializes the

decisions made at the meeting. You do not indicate, nor is it otherwise apparent, that the document reflects the legal opinion or advice of the attorney or client confidences. Accordingly, we conclude that Exhibit B may not be withheld from required public disclosure under section 3(a)(7).

Attachment C is a draft letter to Mr. Charles Henderson from the Director of Engineering Services. Attachments D and E contain the comments of an assistant city attorney regarding the draft letter in Attachment C. You claim that these documents contain "confidential communications from the attorney to the client, and from the client to the attorney." We conclude that Attachments C and E reveal client confidences and that Attachments D and E contain attorney legal advice or opinion. These documents also contain some factual information not protected by the attorney-client privilege. This information, however, is inextricably intertwined with attorney legal advice or opinion and client confidences. Accordingly, these documents may be withheld in their entirety under section 3(a)(7) of the Open Records Act.

Finally, you claim that portions of Attachment B relating to the medical condition of several city employees is protected by section 3(a)(1) in conjunction with common law privacy doctrine.¹ Section 3(a)(1) excepts "information made confidential by law, either Constitutional, statutory, or by judicial decision." Information may be withheld from required public disclosure under common-law privacy if it meets the criteria that the Texas Supreme Court articulated for section 3(a)(1) of the act. See *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under *Industrial Foundation*, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Common-law privacy generally excepts information about a person's illnesses, operations, physical handicaps, or prescription medications, and therefore section 3(a)(1) of the Open Records Act excepts such information. Open Records Decision No. 455 (1987).

¹Some of the information submitted to us for review implicates the requestor's privacy interests. See Open Records Decision No. 455 (1987) at 9 (common law privacy protects information regarding a person's illnesses or injuries). Section 3B of the Open Records Act, however, provides for a special right of access to information otherwise protected by privacy interests. It states, in pertinent part:

A person or the authorized representative of a person has, beyond the right of the general public, a special right of access to copies of any records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests.

V.T.C.S. art. 6252-17a, § 3B(a). Thus, to the extent that it implicates the requestor's privacy, the requested information may not be withheld from the requestor under section 3(a)(1) of the Open Records Act in conjunction with common law privacy.

We have examined the documents submitted to us for review. We conclude that some of the information contained in these documents is intimate and embarrassing. We also conclude that there is no legitimate public interest in this information and that common-law privacy interests therefore protect it. For your convenience, this information has been marked. It must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act. The remaining information, except as noted above, must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GCK/le

Enclosures: Submitted documents

Ref.: ID# 14809
ID# 14642

cc: Mr. Charles Edward Henderson
1405 Barcelona
Corpus Christi, Texas 78416
(w/o enclosures)